IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-090661 TRIAL NO. B-0901633
Plaintiff-Appellee,	:	*JUDGMENT ENTRY.*
vs.	:	
JELANI SULLIVAN,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.[1]

In the early morning hours of March 8, 2009, defendant-appellant Jelani Sullivan forcibly entered the apartment of Roxanne Layde. The two began arguing, and Sullivan struck Layde in the head, knocking her to the ground. Sullivan then stabbed Layde with a knife approximately 24 times, piercing her face, throat, and upper-body. Layde survived the attack, but suffered permanent nerve damage to her body, head, and left vocal cord.

Sullivan was arrested and charged with one count of attempted murder with specifications, two counts of aggravated burglary, and two counts of rape. Sullivan and the prosecution agreed to a plea bargain. The state amended the attempted-murder count to felonious assault, a second-degree felony, and dismissed the specification. The state also dismissed one of the aggravated-burglary counts and both rape counts. In exchange, Sullivan pled guilty to the felonious-assault count[2] and the remaining aggravated-burglary count, a first-degree felony.[3] The trial court

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[1] See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.
[2] R.C. 2903.11.
[3] R.C. 2911.11(A)(2).

accepted the plea, found Sullivan guilty, and sentenced him to eight years' incarceration for felonious assault and ten years' incarceration for aggravated burglary. The trial court ordered the sentences to run consecutively for a total of 18 years' incarceration. Sullivan has appealed and asserts two assignments of error.

In his first assignment of error, Sullivan argues that he received ineffective assistance of counsel that ultimately led to him entering his guilty pleas. Sullivan argues that during the sentencing hearing, after he had already pled guilty, he commented, "At that point I ain't know what to do, okay? I blacked out. I was scared. I can't even remember what happened that day." Sullivan argues that his attorney should have perceived this comment as a "red flag" and pursued a suggestion of incompetency.

To show ineffective assistance of counsel, a defendant must prove (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense.[4] To prove that counsel's performance was deficient, the defendant must show, under all the circumstances, that counsel's representation fell below an objective standard of reasonableness.[5] To prove prejudice, the defendant must show that there was a reasonable probability that, but for counsel's unprofessional errors, the outcome of the case would have been different.[6] In addition, counsel is strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment.[7]

After a thorough review of the record, we hold that the performance of Sullivan's counsel was not deficient. The record reveals that counsel negotiated a favorable plea bargain for Sullivan considering Sullivan's extensive criminal record. The plea bargain resulted in the dismissal of three first-degree felonies and the

[4] *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052.
[5] Id.
[6] Id.
[7] Id. at 690.

reduction of an attempted-murder-with-specifications charge to a second-degree felonious assault.

Further, R.C. 2945.37(G) provides that to be found incompetent to stand trial, a defendant must demonstrate a present mental illness that renders him incapable of understanding the nature and objective of the proceedings against him or of assisting in his own defense. The record is devoid of any suggestion that Sullivan suffered from any mental illness that impacted his understanding of the plea or the sentencing proceedings, or that he was incompetent to stand trial or to assist in his own defense. Sullivan's first assignment of error is overruled.

In his second assignment of error, Sullivan asserts that the trial court erred when it sentenced him to maximum, consecutive sentences for felonious assault and aggravated burglary. In support of his argument, Sullivan argues that the trial court did not consider the sentencing guidelines presented in R.C. 2929.11, did not make the required findings on the record at the sentencing hearing in order to properly impose consecutive sentences pursuant to R.C. 2929.14(E)(4), and did not provide the reasons to support those findings, as required by R.C. 2929.19(B)(2)(c). Sullivan further argues that the trial court improperly considered a victim-impact statement, which, he asserts, was a hearsay statement, made by the victim while not under oath, and without being subject to cross-examination. Finally, Sullivan also argues that the felonious-assault count and the aggravated-burglary count are allied offenses of similar import and should have been merged for the purposes of sentencing.

When reviewing a felony sentence post-*Foster*,[8] an appellate court must follow a two-step process. First, the court must examine the trial court's "compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law."[9] If the sentence is not

[8] *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.
[9] *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, at ¶26.

contrary to law, the sentence is then examined under the abuse-of-discretion standard.[10]

We note that Sullivan's sentence was within the statutory guidelines provided for a first-degree felony[11] and for a second-degree felony;[12] therefore, the sentences were not clearly and convincingly contrary to law. And after a thorough review of the record, we hold that Sullivan's sentence was not an abuse of discretion. At the sentencing hearing, the court considered the presentence-investigation report, the victim-impact statement, a personal letter Sullivan submitted to the court, and Sullivan's extensive criminal record.

We further find no merit to Sullivan's challenge to the trial court's consideration of Layde's victim-impact statement in sentencing Sullivan. Even though the statement contains hearsay, and would, on that basis, be excluded at trial, Evid.R. 101(C)(3) clearly states that the Ohio Rules of Evidence do not apply to sentencing hearings. Therefore, the trial court did not err when it considered the victim-impact statement before sentencing Sullivan.

Finally, we reject Sullivan's argument that felonious assault and aggravated burglary are allied offenses of similar import. The record shows that the offense of aggravated burglary was completed once Sullivan entered Layde's apartment with a deadly weapon or dangerous ordinance, and with the intent to commit a separate criminal act. That separate criminal act was the felonious assault, which requires one to cause serious physical harm to another. The felonious assault was completed once Sullivan began his vicious attack on Layde. The commission of the aggravated burglary did not necessarily result in the commission of the felonious assault.

[10] Id.
[11] R.C. 2929.14(A)(1).
[12] R.C. 2929.14(A)(2).

Therefore, the two are not allied offenses of similar import.[13] Because all of Sullivan's arguments fail, we accordingly overrule his second assignment of error.

In sum, we overrule both of Sullivan's assignments of error. But we note that the trial court failed to address the mandatory issue of court costs at the sentencing hearing or in its judgment entry.[14] We, therefore, reverse the trial court's judgment only to the extent that it failed to address costs. And we remand the case to the trial court to address that issue and to make the appropriate order in its judgment entry. We affirm the trial court's decision in all other respects.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., DINKELACKER and **MALLORY, JJ.**

To the Clerk:

Enter upon the Journal of the Court on June 16, 2010

per order of the Court _____.

Presiding Judge

[13] See *State v. Barker*, 183 Ohio App.3d 414, 2009-Ohio-3511, 917 N.E.2d 324; *State v. Estepp* (Jan. 18, 1989), 1st Dist. No. C-880052, unreported.

[14] See R.C. 2947.23(A); *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278; *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393.